



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT VOI

CRIMINAL CASE NO. 1 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS

VINCENT OPIYO OUMA.....ACCUSED

JUDGMENT

1. **Vincent Opiyo Ouma**, the accused, was charged with the offence of murder contrary to Section 203 as read Section 204 of the Penal Code. It is alleged that on 13/12/2016, at Maweni Village in Voi town within Taita Taveta County he unlawfully murdered one **Alfred William Mwasaru**.
2. The prosecution's case was based on the evidence of 7 witnesses.
3. PW1 **Stella Wandoe Wanjala** a business woman and owner of Double M bar testified that on the material day she opened her bar at around 3;00pm as usual. The deceased walked in and ordered for an energy drink and took a seat at the back of the bar while chewing miraa. The deceased left at about 6;30pm. It was her testimony that at around 9;00pm the accused walked into the bar and ordered for napoleon whisky. That he then started playing on a betting slot machine and after some time she heard that money had been won by one George [PW2]. An argument ensued and she heard the accused insist that he had won the bet. The said George surrendered and went to take a seat when he was followed by the accused who roughed him up demanding to be given Kshs 60. The witness stated that the deceased walked in at that time and asked the accused person to release George who is PW2 herein. The accused person released PW2 but took his beer and PW2 walked out. The deceased and accused person started scuffling and the witness asked them to leave her bar and they left.
4. The witness further testified that at around 12.30am while she was cleaning the bar and planning to close the same, she heard someone call her from the back door. Upon inquiry on who it was, the deceased answered that it was him and requested her to open the door. He was seated on the floor bleeding. She could not clearly tell where he was bleeding from but the bulb from the bar helped her notice his T-shirt was bloodstained. The deceased requested her to pour water on him which she did and upon inquiry on what had happened he informed her that he had been stabbed using scissors by the accused. The witness called the police who did not respond promptly forcing her to go to the police station. Before she left, she asked members of the public to help her carry the deceased outside for fresh air as he had now moved into the bar and was sleeping on the sofa.
5. The witness testified that at the police station she heard members of the public saying that the scissors that had been used to stab the deceased were on a stone near Mughonyi Plaza; that on coming back to take the deceased to hospital she picked the scissors and placed the same in the police vehicle. The deceased was taken to St. Josephs Hospital Ikanga and later at the mortuary at Moi Hospital Voi. After the deceased was put in the mortuary they left to the bar which was the crime scene and the police took photographs. The witness identified the blood stained T-shirt. The witness also identified the accused who had been arrested while trying to escape after committing the crime.
6. In cross-examination PW1 testified that she witnessed the scuffle between the accused and the deceased; that the deceased person had the authority to order patrons at the bar to leave as he had on several occasions assisted her in asking patrons to stop fighting while at the bar; that the deceased and the accused had left the bar together and she did not know what had transpired thereafter; that it was 30 minutes after they left that she heard the deceased calling out her name from the back door but she never saw the accused or the weapon at that time when she opened the door.
7. The witness further testified that she gave the scissors to the police officers after she had been alerted about them by members of the public; that the game being played at the slot machine was between the accused and PW2 and not between the deceased and the accused; that she had heard the accused person had been arrested near Rosewood Hotel after trying to escape; that she had not seen the accused stab the deceased but the deceased had informed her that he had been stabbed by the accused.
8. PW2 **George Mwalema**, testified that he was an agent working for Chania Courier. He knew the Double M bar as he frequented the

same daily and was present on 12/12/2016. He stated that the pub was owned by PW1 and on the material day he arrived at the bar and found several people there. He ordered for senator keg beer and went to the slot machine in the pub to play. That he inserted a 20 shillings' coin and luckily won Kshs 200. Two people were present at the machine one named Rasta and the accused person. The witness testified that they had previously inserted 20 shillings and after he won Kshs. 200 the accused person claimed that the money won belonged to him, and he left the said Kshs. 200 to the accused. After that the accused followed him to where he had sat and demanded that he gives him an extra Kshs 60. He informed the accused he could not give him the money as he had already left the Kshs 200 to him but he offered to leave his beer to the accused and it is then that a scuffle ensued between the accused and the witness. Soon, the deceased walked into the room and tried to separate PW2 and the deceased. The witness then left but before he got home, he heard noises from behind Maghonyi Plaza. The noises were talking about killing, so he went to the place where the noise was coming from and he found the accused and the deceased on the ground fighting. The light from a nearby kibanda helped him in identifying the two. The accused overpowered the deceased and sat on him and removed scissors from his back pocket which he used to stab the deceased about 5 times. The deceased screamed out and said that he was being killed and it is then that the accused stopped and fled. Members of the public and the witness went after him but he disappeared. The witness testified that they went back to the pub and found the deceased who was not talking by then and was bleeding profusely from the chest and back. The police arrived and took him to hospital but a few minutes later they heard the deceased had passed on.

9. The witness testified that members of the public decided to break into groups in order to search for the accused who had tried to run away. He was finally arrested at Caltex. He identified the accused person and the scissors that had been used in committing the offence. He further identified the blood-stained jungle green T-shirt that had been worn by the deceased.

10. On cross examination the witness testified that no one tried to separate the deceased and the accused because people were scared of the weapon carried by the accused. The witness testified that although he had taken alcohol, he could recall everything.

11. PW3, **Dr Kagona Gitau**, testified that on 16/12/2016, he conducted a post-mortem at Moi Referral Hospital Voi on the body of the late **Alfred William Mwasaru** which body was identified by **Willband Lemo** and **Joseph Muse**. According to him the deceased had several cuts on the head and on the occipital region which had not penetrated the skull and was 8x1cm. He had a cut on the left side of the face and on the left mandibular region measuring 3x0.5cm and cuts on his chest that had penetrated to the lungs. There was haemothorax [which is blood in the chest cavities]. The cut wound was 1x1cm on the right posterior[back] and a cut near the shoulders, posterior region of the chest, around the shoulder region and a deep penetrating wound on the lower abdomen with presence of the blood in the abdominal cavity. According to him, the death of the deceased was due to massive haemothorax haemoperitrium inflicted by a sharp object which was caused by loss of blood as a result of injury and difficulty in breathing as blood entering the chest and lungs reducing the victim's ability to get oxygen to the lungs. The same had to be high velocity like an accident caused by hitting the steering wheel. The witness produced the post mortem report dated 16/12/2016 as Exhibit 3.

12. On cross-examination, the witness stated that he did not know the deceased; that the post-mortem had been carried out by Dr. Katana who was not at the scene of the incident and that he had not seen the weapon used.

13. PW4, **Willbard Ephraim Lyimo**, was sleeping at home when he was informed by his neighbour one Ndolo Samson that his son had been injured at a pub near Maweni. He testified that the deceased was his third born son; that he went to the pub when he confirmed that it was indeed his son who had died; that he touched him and felt his body was warm and he reported the matter at the police station and a police officer returned with him to the scene; that the deceased was taken to hospital where he was pronounced dead; that they took the body to the morgue and while leaving they were informed that the accused had been found at Caltex area as he tried to escape; that the accused person was taken to the police cells.

14. The witness further testified that he was present when the post mortem took place and he identified the accused as the person responsible for the death of his son. On cross examination he stated that he went to the scene after being informed that his son was there. That he is the one who went to report the incidence to the police and he went to the mortuary to identify the body. He stated that he was not present when the injuries were occasioned on the deceased.

15. PW5, **George Lawrence Oguda**, a holder of a BSC chemistry from Punjab University in India and a diploma in Forensic Science and Criminology from Punjab university India working as government chemist for over 20 years stated that he had received exhibits from Inspector Amwayi of the Voi Police Station in relation to this case in a marked envelope accompanied by an exhibit memo:

- 1) **Exhibit A [red scissors] B [blood stained piece of cloth] C [blood stained t-shirt] – Tested positive for human blood...**
- 2) **Exhibit C- a t-shirt was not properly stored and gave partial DNA profile.**
- 3) **Exhibit A-showed a mixed DNA profile belonging to a man and matched Exhibit B and C.**

After the analysis the findings were as follows:

The Exhibit A generated mixed DNA belonging to a male meaning it was blood for more than one person.

16. In cross-examination, PW5 stated that he was not familiar with the accused person and that he did not know to whom the exhibits belonged at the time they were brought in for examination. He testified that the scissors had blood from more than one person and had mixed DNA profile.

17. On re-examination he stated that he had not seen any DNA profile generated from Exhibit C to Exhibit B.

18. PW6 Corporal **Paul Ouma**, was the investigating officer in this matter. He stated that on 12/12/2016 he received a report from PW4 that his son had been stabbed and was lying at Maweni Area near Maghonyi Plaza. That they boarded the vehicle and went to the scene

where they found the deceased lying down. That the deceased was at that time unconscious and had several stab wounds on the abdomen, thigh, temple and chest. The place had few people as it was at night. The T-shirt worn by the deceased had been removed by PW1 after the deceased complained that he was feeling hot. They were informed that the deceased had been stabbed by the accused and they took the deceased to hospital but were informed on getting there that he had already passed on. The body was taken to the morgue and on coming back to the station they were informed that the accused had been found by boda boda guys at Caltex. They went to Caltex and found the accused, who had been injured and was bleeding from the head.

19. PW1 and PW2 informed him that it was the accused who had stabbed the deceased. He booked the accused in the OB and later took him to hospital. After recovery the accused was charged with the current offence. The witness produced the scissors and identified the accused person as being present before court.

20. On cross examination he stated that the incidence report had been made by PW4. That he identified the accused person as he knew him previously and he arrested him after being informed that he was the one who had stabbed the deceased.

21. **Inspector Patrick Amwayi** PW7 stated that on 13/12/2016 he went to the police station and found the accused person at the cells. His legs had been broken by boda boda riders. He was taken to hospital for treatment. He stated that his investigations revealed that on 12/12/2016 the accused person had gone to drink at Double M bar when a scuffle ensued and they went outside the bar with the person he had been involved in the scuffle with. Once outside, the accused attacked the deceased and stabbed him occasioning him the fatal injuries. When the accused saw the deceased fall, he ran to the police station to make a report over the said death and the police were called to the scene.

22. The accused was charged with murder because of the information from the witnesses PW1 and PW2. The accused also made a report that he had been injured after a fight but the information by PW2 led the investigators into charging the accused with the present crime.

23. On cross examination the witness stated that he relied mainly on the evidence of PW1 and PW2; that PW1 did not witness the fight but the same was witnessed by PW2; that during interrogation PW2 was sober and the pair of scissors was the only item that was discovered from the scene.

24. When placed on his defence, the accused, **Vincent Opiyo Ouma**, testified that on 12/12/2016 he went to Double M bar where he sometimes bought vegetables. That he ordered for a napoleon brandy, an alcoholic drink, and 2 glasses of senators' keg. He then went to the play machine [gambling] and placed 80 shillings and it is then that PW2 also came at the machine and placed 20 shillings. That the machine gave Kshs 200 and a scuffle started between him and PW2 who stated that he had won the bet. They were asked to leave the bar by the owner and while outside he was accosted by 3 people including PW2 and he defended himself. He shouted for help and the deceased who was among the 3 people who had attacked him was cornered by members of the public who started beating him. Accused stated that he was taken to the police station where he was issued with an OB number and a letter that referred him to the hospital for help. He produced the said note before court.

25. He then left for the hospital but found that doctors were on strike and had to find another hospital. It was on his way to the other hospital that he was accosted by 3 men again carrying a metal rod and who attacked him for causing the death of one of their friends. The accused's legs were broken by the attackers and after a while the police rescued him and he was placed in a cell. He was later taken to hospital for 2 months and was fixed with a metal plate from the hip to the ankle. The accused denied having killed the deceased. He testified that the alleged weapon used during the offence which was a pair of scissors was not found on him.

Determination

26. I have considered the evidence on record as well as the submissions made on behalf of the parties.

27. Section 203 of the **Penal Code** under which the accused is charged provides that: -

Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.

In my view the issue to be determined by this Court is:

Whether the accused with malice aforethought inflicted the fatal injuries to the deceased.

28. The ingredients of murder were explained in the case of **Roba Galma Wario v Republic [2015] eKLR** where the court held that:

“For the conviction of murder to be sustained, it is imperative to prove that the death of the deceased was caused by the appellant; and that he had the required malice aforethought. Without malice aforethought, the appellant would be guilty of manslaughter, as it would mean the death of the deceased during the brawl was not intentional.”

29. The elements of the offence of murder were further listed by **M. Odero, J** in **Republic v Mohammed Dadi Kokane & 7 Others [2014] eKLR** as follows: -

(a) The fact of the death of the deceased.

(b) The cause of such death.

(c) Proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused persons, and lastly

(d) Proof that said unlawful act or omission was committed with malice aforethought.

30. In the instant case, the prosecution tendered evidence to the events leading to the death of the deceased as follows; that on 12/12/2016 the deceased who was a regular at the local Double M bar entered the said bar and ordered for an energy drink which he took and left after sometime. That later PW2 who was also a regular customer of PW1 who was the owner of Double M bar entered the said bar and while partaking the said drink took part in a gambling game on a betting machine that was in the said bar. It is then that the accused person herein entered the said bar, ordered for napoleon brandy, an alcoholic drink, and joined PW2 on the betting machine and placed his bet. The evidence presented was to the effect that the bet was won and resulted in a scuffle between PW2 and the accused as both of them claimed the win. That the accused person manhandled PW2 and it is at that time that the deceased walked in and separated the two from the fight.

31. PW2 testified that he walked out of the bar and after a few minutes heard voices shouting asking someone to stop a fight as it would result in him killing the person he was allegedly fighting with. PW2 rushed to the scene and witnessed the accused person stab the deceased severally using a pair of scissors. The accused person then ran away leaving the deceased laying on the ground helplessly as members of the public who were by then gathering at the scene screaming for help.

32. With regard to the cause of death, the post mortem report showed that the cause of the deceased's death was massive haemothorax haemoperitorium [entrance of blood in the chest cavity] inflicted by a sharp object which was caused by loss of blood as a result of injury and difficulty in breathing as blood entered the chest and lungs reducing the victim's ability to get oxygen to the lungs. From the foregoing the deceased did not die a natural death but was murdered.

33. The issue then is, who murdered the deceased? PW2 who was an eye witness to the attack on the deceased by the accused person provided direct evidence that the accused caused the death of the deceased. In criminal cases, it is trite law that the burden of proof lies with the prosecution and the standard of such proof is beyond reasonable doubt. **Viscount Sankey L.C** in the case of **H.L. (E)* Woolmington vs. DPP [1935] A.C 462 pp 481** in what has been described as a subtle and masterly fashion stated the law on legal burden of proof in criminal matters, that;

“Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether [the offence was committed by him], the prosecution has not made out the case and the prisoner is entitled to an acquittal.

38. This direct evidence that the accused person stabbed the deceased has not been displaced. At all times there is consistent evidence that the accused and the deceased were together outside the bar, and that they fought. PW2 testified that he saw the accused take a pair of scissors from his pocket and stab the deceased five times on the abdomen. There is no evidence that any other person other than the accused fought with the deceased. The use of a sharp weapon as a scissor, which was used several times to stab the deceased is clear indication that the accused had intention to kill the deceased, or did to care whether the deceased died or lived.

39. On whether it was proved that the said unlawful act was committed with malice aforethought, Section 206 of the **Penal Code** on malice aforethought states: -

Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—

(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;

(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

(c) an intent to commit a felony;

(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.

40. The law is clear that the burden is on the prosecution to prove that unlawful act was committed with malice aforethought. In the present case there was evidence that prior to the deceased being attacked, there had been a fight between PW2 and the accused. The said fight was occasioned by a betting game in which the accused insisted that he had won and wanted the money given to him. The said amount was Kshs 200 which PW2 testified that he opted to give the accused but despite that, the accused still followed him to the table and asked for a further Kshs 60 from PW 2. PW1 testified that she saw the accused grab PW2 by his shirt and it is then that the deceased walked in and was asked by PW1 to help break the fight which he did. It is clear that the accused person was not happy with the interference from the deceased. PW2 testified that after the deceased separated him from the altercation with the accused, he left but few minutes later he heard voices asking a person to stop fighting as he would kill whoever it was that he was fighting with. That he walked towards the said voices and saw that the people fighting were the deceased and the accused. The accused overpowered the deceased, pinned him down and stabbed him severally using a pair of scissors which was produced in court as an exhibit being the murder weapon.

41. The accused person raised the defence of having acted in self defence as a result of an attack from PW2 and the deceased. He stated that he was on his way from the bar after having a drink and falling into an altercation with PW2 when he was accosted by 3 individuals who robbed him off his money and injured him. That he retaliated and as a result injured the deceased who succumbed to the injuries sustained. He produced a note before court indicating that the same had been issued to him at the police station in order to help him attain the necessary medical attention. The testimony of the accused is not consistent with his action as narrated by PW1 and PW2. This Court is not satisfied that the accused person was attacked or had acted in self defence. He intentionally took a weapon from his pocket and severally stabbed the deceased. To the contrary, I believe fully the testimony of PW1 and PW2, that the accused was the aggressor and he used a scissor to intentionally inflict fatal injuries on the deceased. I am satisfied that the prosecution has proved its case beyond any reasonable doubt. The Court of Appeal in **Moses Nato Raphael v Republic [2015] eKLR**, in regard to reasonable doubt, stated thus:

“What then amounts to “reasonable doubt”? This issue was addressed by Lord Denning in Miller v. Ministry of Pensions, [1947] 2 ALL ER 372 where he stated:-

‘That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.’”

42. In the upshot, I find and hold that the prosecution had proved its case beyond reasonable doubt, and that the accused person herein murdered the deceased one **Alfred William Mwasaru**. The prosecution has proved beyond reasonable doubt all the ingredients of the charge of murder, and displaced the accused defence. This Court is satisfied that the accused is guilty as charged. The accused is hereby convicted of the offence of murder as charged.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 3RD DAY OF AUGUST, 2021.

E. K. OGOLA

JUDGE

Judgment delivered via MS Teams in the presence of:

Appellant in person

Mr. Chirchir for DPP

Ms. Peris Court Assistant